# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr B A Wahla**

**Respondent:** **HGA Accountants and Financial Consultants Ltd.**

**Heard at**: **East London Hearing Centre (by video)**

**On:** **23, 24 and 25 November 2022**

**Before:** **Employment Judge P Klimov**
**Members:** **Ms T Jansen**
**Mr C Williams**

**Representation:**

**For the Claimant:** Mr M Firman, legal adviser

**For the Respondent:** Ms K Barry, counsel

**JUDGMENT** having been given to the parties orally on 25 November 2022 and written reasons having been requested by the Claimant on 30 November 2022, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Background and Issues

1. By a claim form presented on the 16 August 2021, the Claimant brought claims for unfair dismissal, disability discrimination, notice pay, holiday pay, unauthorised deduction from wages and for other financial payments.

2. A default judgment was entered against the Respondent on 17 March 2022. However, upon reconsideration at a remedy hearing on 10 June 2022, the default judgment was set aside, and the Respondent's response accepted.

3. The Respondent denies all the claims. The Respondent does not accept that the Claimant had a disability within the meaning of s.6 of the Equality Time 2010 ("**EqA**") at the relevant times.

4. Mr Firman appeared for the Claimant and Ms Barry for the Respondent. The

Tribunal is grateful to both representatives for their assistance.

5. The parties agreed on a list of issues. It was accepted by the Tribunal. For ease of reference, the agreed List of Issues is reproduced as an annex to this judgment.

6. At the start of the hearing, the Tribunal discussed with the parties the issues in the case. During that discussion the parties indicated that the Claimant's money claims were close to being settled. The hearing was adjourned until 2pm for the Tribunal to read the papers. After the adjournment the parties confirmed that they had reached an agreement on all Claimant's money claims and the agreed net sum that the Respondent must pay to the Claimant in satisfaction of his claims for unlawful deduction from wages, notice pay/breach of contract, holiday pay, statutory sick pay and arrears of wages was £22.43. A judgment by consent was pronounced to confirm that. That meant that issue 4 on the List of Issues has fallen away.

7. The Claimant confirmed that his direct disability discrimination claim was with respect to all 12 alleged discriminatory treatments listed under paragraph 2.3 on the List of Issues.

8. Later the Claimant confirmed that the alleged less favourable treatment 2.3.12 was a summary of the 11 alleged less favourable treatments (2.3.1 – 2.3.11) and not a stand-alone alleged less favourable treatment.

## Evidence

9. The Tribunal was referred to various documents in the bundle of documents of 271 pages the parties introduced in evidence. The bundle included the Claimant's disability impact statement, supporting medical evidence, and a witness statement he prepared for the remedy hearing on 10 June 2022.

10. There were three witnesses: the Claimant, and Mr N Ahmad (the Managing Director) ("**NA**") and Ms S Vetrevell (former Accountant Assistance) for the Respondent. All gave sworn evidence and were cross-examined.

11. The Claimant's witness statement had various pdf documents embedded in the text, which could not be opened, and about 200 pages of additional documents attached to it. Many of those documents appeared to be duplicates of the documents included in the bundle. At the start of the hearing the Tribunal agreed with the parties that it would only read the pleadings, the witness statements (including the disability impact statement) and the documents referred to in the witness statements, and if the parties wished to draw the Tribunal's attention to any other documents in the bundle, or to the documents embedded into or attached to the Claimant's witness statement, they should do that during evidence.

12. At the end of the hearing the Tribunal gave an extempore judgment dismissing all Claimant's disability discrimination claims. The Tribunal's judgment was

unanimous.

## Findings of Fact

13. In 2011, while still living in Pakistan the Claimant was diagnosed with obsessive compulsive disorder, depression and anxiety. He came to this country in 2017. His condition was noted by his GP and the Claimant was prescribed antidepressants.

14. Prior to joining the Respondent in April 2020, the Claimant had three other employments in this country. He did not disclose his mental health condition to any of his previous employers.

15. The Respondent is a small accountancy firm which at the time of the Claimant's employment had been 4 to 6 staff including the Claimant.

16. When he was interviewed for the job with the Respondent, the Claimant did not disclose his mental illness. He did not disclose it when he joined the Respondent or at any time during his employment until the disciplinary meeting on 28 March 2021.

17. At the job interview NA explained to the Claimant the role he would have to perform, which involved managing a portfolio of the Respondent's clients by providing them with accounting, tax and payroll advisory and other services. The portfolio included two care homes. NA did not promise to the Claimant that an assistant would be hired or allocated from the existing staff to help the Claimant to manage his workload.

18. The Claimant commenced his work for the Respondent as an accountant in early April 2020. When he joined the Respondent, the Claimant requested to be allowed to start later in the morning, at 9:30am, so that he could do exercises on his leg prescribed to him after a surgery. That was agreed by the Respondent. The Claimant did not request the Respondent to make any other reasonable adjustments.

19. The Claimant found the job demanding and stressful. He had limited accounting experience and was still learning. In the course of his work for the Respondent the Claimant made various mistakes, including two serious errors of making on 28 August 2020 two large unauthorised payments from a client's account to HRMC. When the matter was discovered the Claimant initially blamed Ms Vetrevell for the mistake. Later he accepted the responsibility for the mistake, apologised and blamed it on him being tired and stressed, having worked for six months without a break, and missing his family in Pakistan. No disciplinary actions were taken against the Claimant for those errors.

20. On 29 September 2020, the Claimant emailed NA telling NA that he would be taking holidays. The email read:

"*This is to inform you that I am taking two days leave from my annual holidays from 01/10/2020 until 02/10/2020.*

*Sorry for informing at last minute but I require this break due to my mental health as I am working continuously from last six moths [sic] without any rest*."

21. NA authorised the Claimant's leave.

22. On 10 November 2020, the Claimant informed NA that he would be taking a study leave from 25 November to 8 December 2020 to prepare for the Association of Chartered Certified Accountants ("**ACCA**") exam.

23. On 16 November 2020, the Claimant wrote to NA again asking for an update on his email about the study leave. NA told the Claimant verbally that he could not approve his study leave of a such length because it was a busy period in the office due to new clients being taken on, and that other employees who studied for the same exam had taken only 2-3 days off. NA said that if the Claimant were to take 2-3 days off to study for the exam that would not be a problem. The Claimant went off for two weeks despite NA not authorising leave of absence.

24. In January 2021, a new member of staff, Ramesh, joined the Respondent. Ramesh had prior experience working in an accountancy practice and was able to perform his work with minimum supervision. However, being new to the Respondent's practice, he was not familiar with the software programme used by the Respondent and sometimes he asked other employees, including the Claimant, to assist with the software. Ramesh was not hired as the Claimant's assistant and the Claimant was not required to train Ramesh.

25. During the Claimant's employment, the Respondent received several complaints from its clients and employees about the Claimant's performance and conduct. These were related to the Claimant's communication skills, attitude, and quality of his work.

26. On 28 January 2021, the Claimant informed NA that his grandmother in Pakistan was very unwell and he would be travelling to Pakistan to see her whether NA approved his leave or not. The Claimant said that his father had booked him a ticket to travel on 4 February 2021. He did not give a return date.

27. NA asked the Claimant why he was planning on travelling to Pakistan in a week's time if his grandmother was seriously ill and could pass away any time. NA suggested to the Claimant that if his grandmother passed away, the Claimant immediately went to Pakistan to attend the funeral and return a few days later. NA did not authorise the Claimant's leave because February 2021 was a busy time for the Respondent as many of its clients required help with submitting tax returns by the deadline extended by the government due to the Covid-19 pandemic.

28. On 2 February 2021, the Claimant did not come to work. He went to Pakistani consulate to extend his passport, so that he could travel to Pakistan on 4 February 2021. The Claimant did not inform NA about that in advance. He tried to call NA from the consulate but could not connect because NA was on the Tube. When NA came to the office and saw that the Claimant was not there, NA tried to call the Claimant. The Claimant saw that NA was calling him but decided not to take the call. After that NA sent the Claimant a WhatsApp message saying: "Where the hell are you".

29. On 4 February 2021, the Claimant went to Pakistan. His leave was not authorised by NA. He returned to the UK on 24 February 2021. Shortly upon his return to the UK, the Claimant was admitted to a hospital with typhoid fever.

30. On 3 March 2021, NA wrote to the Claimant inviting him to attend a disciplinary meeting via Zoom to discuss the issues concerning the Claimant's not giving reasonable notice to take leave, taking unauthorised leave, and the Claimant's unsatisfactory standards of work. The letter stated that if the allegations were substantiated, this would be regarded as serious misconduct.

31. On 5 March 2021, the Claimant's wife informed NA that the Claimant was in the hospital with typhoid fever. The disciplinary meeting was postponed twice pending the Claimant's recovery. The Claimant was discharged from the hospital on 14 March 2021 and signed off work by his GP until 19 March 2021.

32. While the Claimant was in the hospital, NA discovered that one-time passwords ("**OTP**") that were generated for the Respondent's accountants to log into their client's tax portals were being sent to the Claimant's private mobile phone. That meant that the Respondent's staff was unable to access the clients' tax portals to complete necessary tasks. NA and another member of staff tried to contact the Claimant to ask him to forward the OTPs. The Claimant was not well enough to deal with that, but his wife was able to send OTPs to the Respondent.

33. On 17 March 2021, NA wrote to the Claimant asking him why he gave his personal mobile number for the OTPs instead of the company's number and telling him that the matter would be added to the list of disciplinary matters to be discussed at the hearing. The Claimant's wife replied, advising NA that the Claimant was still very unwell.

34. On 21 March 2021, the Claimant emailed NA saying that he had been discharged from the hospital however was still recuperating and following medical advice. The email he wrote:

"[..]
*This email is to update you about my health condition. As you are aware of my poor health, due to which I was admitted in isolation to King George Hospital for over 10 days, although I have been discharged, however I am still recuperating and following medical advice. I have been also going into*

*hospital for daily injections for my antibiotics. As evidence of my duration of stay in hospital, please find attached the hospital discharge form*.

*Kindly note that for my complete recuperation, I have been strongly advised to avoid any stress or conflicting situations due to work which can cause mental health deterioration, which is covered in the sick note. The added mental stress of work has delayed my recover and my doctor does not see me as fit to return to work. Therefore, my sick leave has been extended by GP, so that I can recover fully. For your reference, please find attached the sick note for duration of 18th March until 29th March 2021, as I have not recovered yet*.

*During my time at hospital and after discharge, I was incapable of working physically and mentally. Hence, my wife helped you where she could.*

*I further request you please to process my February salary, as this will help my mental health, family situation and financial troubles I am in, which is further adding to my anxiety and depression which has also affected my mental health and is not allowing me to recover fully.*

*I hope you can understand what difficulty I am in and can help me in this situation*.
[..]"

35. On 25 March 2021, the Claimant emailed NA confirming that he was feeling much better and would be returning to work on 29 March 2021. The Claimant asked to confirm the date and time of the postponed disciplinary meeting and requested further information and documents related to the disciplinary matters. On 26 March 2021, NA responded to the Claimant with the requested information.

36. On 28 March 2021, the disciplinary meeting was held. In attendance were the Claimant, NA and Ms Vetrevell, who took the notes. At the meeting when questioned about taking unauthorised leave, the Claimant said that he was suffering from a long-term mental illness (depression and OCD). That was the first time the Claimant expressly disclosed his mental health condition to the Respondent. At the end of the meeting the Claimant refused to sign the notes saying that he wished to review them properly. No disciplinary decision was taken at the meeting.

37. On 31 March 2021, the Claimant wrote to NA saying that he was signed off work until 2 April 2021 by his GP with mixed anxiety and depressive disorder. He enclosed a sick note. The Claimant's sick leave was extended by his GP until 3 May 2021.

38. On 26 April 2021, Claimant wrote to NA submitting his resignation and giving his last day at work as 3 May 2021. Together with his resignation letter the

Claimant submitted a grievance letter. His grievance was about; (i) the Respondent not making reasonable adjustments to accommodate his mental health condition, (ii) various episodes of what the Claimant described as harassment by the Respondent, (iii) "*mental distress due to financial hardship*" caused by the Respondent failing to pay his February 2021 salary, (iv) "*mental stress whilst in the hospital*" by reason of the Respondent trying to contract the Claimant to obtain OTPs when he was in the hospital with typhoid fever, (v) failure to provide employment contract, code of conduct and health and safety documentation and training, and (vi) unfair disciplinary hearing.

39. On 3 May 2021, NA wrote to the Claimant asking whether he wished to reconsider his resignation, giving the Claimant until 10 May 2021 to confirm, and stating that a meeting would be arranged to hear the Claimant's grievance.

40. On 7 May 2021, the Claimant responded confirming his resignation.

41. On 24 May 2021, NA wrote back confirming the Claimant's resignation and arrangements with respect to the Claimant's final pay and post-employment restrictions and obligations.

42. The grievance meeting did not take place. There was some further correspondence between the parties concerning the Claimant's final pay and his outstanding loan which the Respondent had advanced to the Claimant to help with a purchase of a car.

*Did the Claimant have a disability at the relevant times?*

**The Law**

43. Section 6 EqA contains the following definition of disability:

> ***6 Disability***
>
> *(1) A person (P) has a disability if—*
> *(a) P has a physical or mental impairment, and*
> *(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities*."

44. The relevant point in time to be looked at by the tribunal when evaluating whether the employee is disabled under s. 6 EqA is not the date of the hearing, but the time of the alleged discriminatory act(s) - see ***Cruickshank v Vaw Motorcast Ltd*** [2002] I.C.R. 729.

45. In ***Goodwin v Patent Office*** [1999] I.C.R. 302**,** Morison J (President, as he then was), provided guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995 (the predecessor legislation to the EqA). The guidance remains relevant in interpreting the meaning of disability under s.6 EqA. Morison J held that the following four questions should be answered, in order:

a) Does the applicant have an impairment which is either mental or physical? (the "**impairment condition**"),

b) Does the impairment affect the applicant's ability to carry out normal day-to-day activities, and does it have an adverse effect? (the "**adverse effect condition**")

c) Is the adverse effect (upon the applicant's ability) substantial? (the "**substantial condition**"), and

d) Is the adverse effect (upon the applicant's ability) long-term? (the "**long-term condition**").

46. It is for the employee to prove that he or she is disabled, that is to show, on the balance of probabilities, that he/she satisfies all of the above four conditions.

47. S. 212(1) of the EqA defines "substantial" as meaning "more than minor or trivial."

48. Whether an impairment has a substantial adverse effect is for the tribunal to decide, taking account of the statutory Guidance on matters to be taken into account in determining questions relating to the definition of disability (the "**Guidance**"). The Guidance sets out a number of factors to consider including: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5 and B6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12].

49. Appendix 1 to the EHRC Employment Code of Practice also provides guidance on the meaning of "substantial". It stated at [6]: "*Account should… be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation*."

50. "*Day to day activities*" encompass activities which are relevant to participation in professional life as well as participation in personal life, and that the tribunal should focus on what the employee cannot do, not what he or she can do.

51. The Guidance provides the following examples of what is meant by "normal day to day activities". "*In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities"*.

52. In the Appendix to the Guidance, an illustrative non-exhaustive list of factors is set out which, if experienced by a person, would be reasonable to regard as

having a substantial adverse effect on normal day to day activities. There is a separate list of what it would not be reasonable to regard as having a substantial adverse effect on normal day to day activities.

53. An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, includes:

- *persistent general low motivation or loss of interest in everyday activities.*
- *persistent and significant difficulty in reading or understanding written material where this is in the person's native written language, for example because of a mental impairment, or learning disability, or a visual impairment (except where that is corrected by glasses or contact lenses).*
- *frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions.*
- *persistently wanting to avoid people or significant difficulty taking part in normal social interaction or forming social relationships, for example because of a mental health condition or disorder.*
- *persistent distractibility or difficulty concentrating.*

54. An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, includes:

- *inability to fill in a long, detailed, technical document, which is in the person's native language, without assistance.*
- *Inability to concentrate on a task requiring application over several hours*.

55. Paragraph 5(1) of Schedule 1 to the EqA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means "*could well happen*" (see ***Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening)*** 2009 ICR 1056, HL). This means that in assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored.

56. Schedule 1, part 1, para. 2 of the EqA 2010 defines "long-term" as follows:

*"The effect of an impairment is long-term if –*
*it has lasted for at least 12 months,*
*it is likely to last for at least 12 months, or*
*it is likely to last for the rest of the life of the person affected"*.

57. Tribunal must analyse all three scenarios envisaged in paragraph 2 of schedule - see ***McKechnie Plastic Components v Grant*** UKEAT/0284/08.

58. '*Likely*' has been held to mean it is a "*real possibility*" and '*could well happen*' rather than something that is probable or more likely than not – see ***SCA Packaging Ltd v Boyle*** [2009] ICR 1056.

59. The Guidance states that conditions with effects which recur only sporadically or for short periods can still qualify as long-term impairments for the purposes of the Act. If the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. The Guidance says that it is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met [C7]

60. In a recent case of ***Tesco Stores Ltd v Tennant***, UKEAT/0167/19, the EAT held that, where the employee's condition was found to have the necessary substantial adverse effect, but the employee provided no evidence that the effect was "likely" to last for at least 12 months, the Tribunal erred in finding the employer liable for acts of discrimination before the effects had in fact lasted for 12 months.

**Submissions and Analysis**

61. The Respondent accepts that at the relevant times the Claimant had a mental impairment, namely acute anxiety and/or depression and/or obsessive-compulsive disorder. However, the Respondent does not accept that the Claimant's mental impairment at the relevant times amounted to a disability within the meaning of s.6 EqA, because, the Respondent argues, the evidence does not show that the impairment had a substantial adverse effect on the Claimant's ability to carry out normal day-to-day activities, or that the adverse effect was long-term.

62. The relevant period for the purposes of evaluating whether the Claimant had a disability is a period between April 2020, when the Claimant joined the Respondent, and 3 May 2021, when the Claimant's employment came to an end. The alleged discriminatory treatment all fall within that period.

63. The burden of proof is on the Claimant to establish all four elements (see paragraph 45 above) to satisfy the definition of disability under s.6 EqA.

64. The Claimant prepared a disability impact statement and provided some medical evidence. However, his medical documentary evidence simply confirm his underlying medical condition but say nothing about how it affects

his ability to carry out normal day to day activities. These are just his GP fit notes signing off the Claimant as unfit for work for various reasons, including unconnected to his mental illness (typhoid fever). The only two other medical documents submitted by the Claimant in evidence are his GP's referral letter to a specialist dated 15 March 2017 (over two years before he joined the Respondent), and the GP letter dated 10 February 2022, confirming the underlying condition and that the Claimant had been taking antidepressants since February 2017. There is no specialist psychiatrist report or any other medical evidence showing how the underlying medical condition affected the Claimant's ability to carry out normal day-to-day activities at the relevant times. There is no medical prognosis to show the likely duration of any adverse effects. No evidence about correcting or controlling effects of treatments and medications.

65. The Claimant's disability impact statement and his witness statements for this and for the remedy hearings do not deal with the issue of substantial adverse effect in a satisfactory way either. The Claimant explains his symptoms, such as overthinking and not being able to decide on things and having negative thoughts. However, he does not deal with the critical question of how these symptoms affect his ability to carry out normal day-to-day activities. He writes that if his condition "gets really bad" he is not able to sleep. However, he does not say how often this happens and the extent of his sleep disturbance.

66. The Claimant also says in the statement that he needs extra time for reading and processing information for exams, and it takes him longer to revise for exams. In cross-examination the Claimant said that he had been given extra 30 minutes for his ACCA exam. He did not provide any evidence to support that assertion, or any evidence to show that such extra time was substantially more than the normal time allocated for the ACCA exam.

67. In any event, taking exams is not part of normal day-to-day activities. The Guidance states that it would not be reasonable to regard inability to concentrate on a task requiring application over several hours as having a substantial adverse effect on normal day-to-day activities.

68. Furthermore, there is no evidence in front of the Tribunal, from which it can reasonably deduce that giving the Claimant extra time for the ACCA exam shows that the Claimant's mental condition had substantial adverse effects on his ability to carry out normal day-to-day activities.

69. Most evidence on adverse effect on the Claimant's ability to carry out normal day-to-day activities came from cross-examination of the Claimant. In answering Ms Barry's questions, the Claimant said that he had difficulties with some daily activities. Most relevant of those were the Claimant saying that he is getting tired reading materials and needs to take a break after reading 5 pages because otherwise he loses focus and concentration. He also said that when shopping he sometimes might have difficulties choosing between various products when there is too much choice on a shelf in a supermarket. He said that he had no problems with using the public transport or driving a car. He said that he had no problems watching TV programmes he likes,

though when he feels depressed, he tries to avoid watching depressing news. He also said that, although initially he might be hesitant to engage with unfamiliar people, once he met them once or twice, he had no issues with interacting with them. He said he had no problems with understanding instructions and asking for help when he did not know how to do things.

70. None of that was in his disability impact statement, his witness statement for the remedy hearing or in his witness statement for this hearing. This is very surprising, given that the Claimant's disability discrimination claims rest upon him being able to establish that at the relevant times he had a disability. The Claimant has been professionally advised at least from January 2022. The Claimant's statements were produced after Mr Firman came on record. These critical questions are also clearly set out in the agreed List of Issues.

71. There is also no satisfactory evidence about treatments and medications the Claimant claims he has been having to control his condition, and about the effects of such medications on his ability to carry out normal day to day activities, despite these issues being flagged up as questions 1.3 and 1.4 in the agreed List of Issues. Therefore, there is no proper evidential basis upon which the Tribunal could reasonably place reliance for the purposes of determining whether the Claimant's impairment would have had a substantial adverse effect in the absence of such treatments and medications. Although usually relatively little evidence is required to raise the issue of "deduced effects", nonetheless some reliable evidence is required for the Tribunal to decide this issue.

72. Although in his disability impact statement the Claimant says that his condition has been managed by medication, he does not say how his ability to carry out normal daily activities would have been affected if he had stopped taking the medication or reduced their dosage. He talks about side effects of the medications, but that is a different question. There is no medical evidence on the deduced effect either.

73. Returning to the daily activities the Claimant says he had difficulties with at the relevant times. On balance, the Tribunal does not accept the Claimant's evidence that he cannot read more than 5 pages of text without having to stop due to losing focus and concentration. This contradicts his evidence that he was able to manage the workload and never missed the deadline at work, and, in his own assessment, his performance was perfect. Considering his role to achieve that standard of work, it would have required the Claimant to read a lot more than 5 pages of text and concentrate on tasks for a considerably longer than a few minutes it takes to read 5 pages of text.

74. We considered the Claimant's evidence that to meet the deadlines he had to work late and on the weekends. Again, surprisingly this was not something he stated in any of his three witness statements. This also contradicts his evidence that he was not allowed to work from home, and that he only worked from the office, regularly starting a half an hour later and finishing a half an hour later than the normal 9am to 5pm office hours. Therefore, we do not accept the Claimant's evidence that the adverse effect on the Claimant's work

performance caused by the alleged inability to read more than 5 pages of text due to his mental health condition, was compensated by the Claimant working late or taking work home.

75. In any event, there is no satisfactory evidence presented by the Claimant as to how much longer he required to complete those tasks as compared to a person without his impairment, and no evidence as to the necessary causal link between his impairment and the extra time he required to complete those tasks.

76. I have already dealt with extra time for the ACCA exams. It is not a normal day-to-ay activity. Also, there is no evidence to show that the extra 30 minutes the Claimant claims he was given for the exam is substantially more than is given to people without the Claimant's impairment. More importantly, there is no evidence to show how that translates into effects on the Claimant's ability to carry out normal day-to-day activities.

77. With respect to not wishing to watch depressing news on the TV, the relevant normal day-to-day activity is watching TV and not particular television programmes. The Claimant confirmed that he was fine watching TV programmes he likes.

78. Finally, as far as selecting products on a supermarket shelf, again, there is no reliable evidence in front of us to show that the Claimant's ability to do shopping was affected and affected in a substantial way. The difficulty of deciding which item to pick from a supermarket shelf when there is too much choice is not uncommon and many people may be prone to be indecisive when faced with multiple choices. We have no reliable evidence either to show that the Claimant was affected substantially more than people who do not have his impairment or that his difficulty to decide on a particular product is linked to his mental impairment.

79. In short, we find that the Claimant has failed to demonstrate the adverse effect condition and the substantial condition.

80. We also have no satisfactory evidence from which we can conclude that the claimed effects were long term. It appears the Claimant simply relies on the fact that he had the underlying medical condition since 2011. However, the relevant question is not whether the underlying medical condition is a long-term, but whether the effects of the impairment on his ability to carry out normal day-to-day activities are long-term.

81. The Claimant provided no evidence that the alleged effects had lasted for 12 months before the alleged discriminatory treatments or were likely to last for at least 12 months or for life. In fact, his evidence appears to be that in his previous employment he had no health-related issues, and that was the reason why he chose not to disclose his mental health condition when he joined the Respondent. In his remedy witness statement, he says that he is now in settled employment, travels to Manchester on a weekly basis, has no issues

with his employer, and believes that his new employer has nothing negative to say about him.

82. There is no reliable evidence as to how often the Claimant suffers episodes of depression and anxiety that adversely affect his ability to carry out normal day-to-day activities and how long such episodes last.

83. Although, considering our conclusion on the adverse effect condition and the substantial condition, the long-term condition question becomes irrelevant, for completeness, we also find that the Claimant has failed to show that the alleged effects were long-term.

84. It follows, that we find that the Claimant has failed to prove on the balance of probabilities that at the relevant times he had a disability within the meaning of s.6 EqA. Therefore, his claims for direct disability discrimination and for failure to make reasonable adjustments fail at this hurdle and stand to be dismissed.

*Analysing the Claimant's discrimination claims on merits*

85. Given our primary conclusion, there is no need for the Tribunal to go any further. However, in case we were wrong on the issue of disability, we proceeded to analyse the Claimant's claims on the presumption that the Claimant were a disabled person within the meaning of s.6 EqA.

86. For the purposes of our further analyses, I will refer to the Claimant's mental impairment as a "disability", but this is simply as a shorthand.

87. To proceed further in our analysis, the first question we need to determine is when the Respondent became aware of the Claimant's disability.

**The Law**

88. In a claim of direct discrimination because of disability, even if the decision maker does not know the precise condition suffered by the employee, he or she will be taken to have actual knowledge of it if he or she is aware of both the underlying problems that amount to the condition and its effects. In determining knowledge, the focus should be on the effects of the impairment, not the cause. In other words, the employer cannot be liable for direct disability discrimination if at the time of the alleged discriminatory treatment the relevant decision maker is not aware of the underlying medical problems and their effects on the employee's ability to carry out his day-to-day activities - see ***Urso v Department for Work and Pensions*** EAT 0045/16.

89. With respect to the claim for failure to make reasonable adjustments Paragraph 20(1) of Schedule 8 to the EqA provides that a person is not subject to the duty to make reasonable adjustments if he or she "*does not know, and could not reasonably be expected to know that an interested disabled person has a disability and is likely to be placed at a disadvantage"* by the employer's provision, criterion or practice ("**PCP**"), the physical features of the workplace,

or a failure to provide an auxiliary aid. This means that the employer is not liable for failure to make reasonable adjustments if the employer can show that it did not have knowledge of the employee's disability or the substantial disadvantage. The burden is on the employer.

90. Knowledge could be actual or constructive, meaning that even if the tribunal finds that the employer did not actually know that the employee had a disability or that he would be placed at a substantial disadvantage by the employer's PCP, the tribunal can still find that in the circumstances the employer should have reasonably known that. The relevant statutory test is: *"does not know, and could not reasonably be expected to know".*

91. While knowledge of the disability places the burden on employers to make reasonable enquiries based on the information given to them, it does not require them to make every possible enquiry, particularly where there is little or no basis for so doing - see ***Ridout v TC Group*** 1998 IRLR 628, EAT.

92. Even where the employer knows that the employee has a disability, it will not be liable for a failure to make reasonable adjustments if it *'does not know, and could not reasonably be expected to know*' that a PCP, physical feature of the workplace or failure to provide an auxiliary aid would be likely to place that employee at a substantial disadvantage - see para 20(1)(b), Schedule 8 EqA.

93. The ECHR Code of Practice at [6.19] states (***emphasis added***):

> *6.19 For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case.* ***What is reasonable will depend on the circumstances. This is an objective assessment.*** *When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.*
>
> *Example: Duty to make reasonable adjustments A worker who deals with customers by phone at a call centre has depression which sometimes causes her to cry at work. She has difficulty dealing with customer enquiries when the symptoms of her depression are severe. It is likely to be reasonable for the employer to discuss with the worker whether her crying is connected to a disability and whether a reasonable adjustment could be made to her working arrangements.*
>
> *6.20* ***The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide***

***the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.***

**Submissions and Analysis**

94. The Respondent claims that the first time it found out that the Claimant had a disability was at the disciplinary meeting on 28 March 2021, when the Claimant revealed his long-term mental illness.

95. The Claimant claims that the Respondent knew much earlier. The Claimant claims that he told NA about his mental health issues and how his workload affected his mental health on many occasions before the meeting. He also relies on his email of 29 September 2020 ("**29/09/20 email**") where he writes that he needs a holiday break "*due to [his] mental health*" as affixing the Respondent with constructive knowledge of the Claimant's disability.

96. On balance, we prefer NA's evidence that the Claimant never told him about his disability before the disciplinary meeting. We found NA a credible witness, who gave clear and cogent evidence to the Tribunal. In contrast, the Claimant's evidence was inconsistent and at times contradictory. He changed his story on whether he told his previous employers about his disability several times. He often answers straight forward questions on this point in an ambiguous way using conditional tense, by starting his answers with "*If they had asked me, I would have said….*".

97. Mr Firman argued that the Tribunal should give allowance to the fact that the Claimant suffers from stress and anxiety and therefore his evidence was, in Mr Firman's words, "*all over the place*". The problem with this submission is that we do not have any reliable medical evidence to show that the Claimant's present mental health is such that his ability to give cogent evidence to the Tribunal is affected. If that was the case, it was incumbent on the Claimant or those representing him to provide such evidence. Other than extra breaks no other reasonable adjustments were requested for the hearing. In fact, the Claimant asked only for one 3 minutes' break during the total of over 4 hours of cross-examination.

98. Furthermore, the fact that the Claimant might have felt stressed and anxious when giving his evidence (which is not unusual for any witness), by itself does not give the Tribunal any evidential material on which it can base its factual findings. The Tribunal cannot make up facts because the Claimant could not remember what happened or because he gave a contradictory account of events. It would also be improper for the Tribunal to prefer the Claimant's evidence on the basis of his anxiety. On all disputed factual issues we found the Respondent's oral evidence more cogent and plausible than those given by the Claimant.

99. Mr Firman invited the Tribunal to consider contemporaneous documents as the best source of evidence when there is a disagreement between the parties on key facts. We agree, and we have done that.

100. On the issue of knowledge, except for 29/09/20 and 21/03/21 emails, there are no other documents that the Tribunal was referred to during the hearing, which show that the Claimant told the Respondent about his disability earlier that the disciplinary meeting. The Claimant was not reticent about asking in writing for things he needed NA to do for him (e.g. informing NA that he is taking leave or asking NA to be paid his salary), and chasing NA a few days later if no replied was received.

101. We find it is not plausible that if the Claimant was indeed experiencing problems at work from the very start, which he claims were causing a deterioration in his mental health, and, as he claims, he was constantly telling NA about that, and asking NA for help, in all this time (and it is almost a year) the Claimant would not have written about that in an email to NA.

*102.* Furthermore, there is nothing in the three Claimant's witness statements which shows that he told NA about his disability before the 29/09/20 email. His disability impact statement says: "*The following were the occasions when Mr. Naveed knew about my mental health together with the attached evidence from 1.0 to 9.0"*.

103. The first one of those occasions is said to be the two meetings with NA before the Claimant joined the Respondent. However, the Claimant's oral evidence to the Tribunal was that he had not told NA about his mental health condition at the job interviews because he did not feel he needed to as everything was fine in his previous employment. There is also a reference to a meeting on 29/07/2020, but again no evidence of what that meeting was about and what was said at that meeting. The following occasion is already the disciplinary meeting in March. There is also a reference to the 29/09/20 email, with which I will deal later in the judgment.

104. The Tribunal also notes that in his resignation letter and the grievance letter the Claimant does not expressly say that he has told NA about his disability before the disciplinary meeting.

105. There is also a GP sick note in the bundle (page 64) dated 1 February 2021 signing the Claimant off work for four weeks with obsessive-compulsive disorder. However, there was no evidence adduced by the Claimant that he had actually sent that note to the Respondent. In fact, his evidence was that he went to Pakistan on 4 February to see his ailing grandmother.

106. For these reasons, on the balance of probabilities, we find that the Claimant did not tell the Respondent about his disability before the disciplinary meeting on 28 March 2021.

107. However, this does not mean that the Respondent did not know of the Claimant's disability before that date. We must analyse the question of constructive knowledge, in particular by reference to the email of 29/09/20.

108. We accept that the words "*due to my mental health*" would ordinary be a "red flag" that the Claimant might have an underlying mental health condition. This would typically call for the employer to make further enquiries. However, the context of the Claimant's saying that is very important.

109. We accept NA's evidence that the background of the 29/09/20 email was the Claimant's making two serious errors by transferring client's money without obtaining authorisation, then initially blaming a colleague for that, then apologising and telling NA that he was feeling stressed because he had been working without a break for 6 months and was missing his family and wanted to go to Pakistan to visit them. That discussion was the relevant background against which the 29/09/20 email must be read, and that is how it was read by NA.

110. We accept NA's evidence that the Claimant had not raised any mental health issues with NA, and that there were no other overt signs of the Claimant struggling mentally or physically. He was making some mistakes at work, but he was relatively new to the job and that was expected. It appears that by that time the Claimant only had 2 days off due to sickness, on 11 August 2020 and on 7 September 2020, as he confirmed himself in the same email of 29/09/20.

111. Therefore, we find that in those circumstances it was not unreasonable for NA to find the reference to "mental health" in the 29/09/20 email as being nothing more than a reference to the Claimant's wanting to get away from the stressful situation at work, see his family and "recharge his batteries".

112. It follows, that we find that the Respondent could not have been reasonably expected to know about the Claimant's disability by reason of the content of the 29/09/20 email.

113. Turning to the 21/03/21 email. There the Claimant refers to "*the conflicting situations due to work which can cause mental health deterioration*" and in the context of asking for his February salary to: "*financial troubles*" which add to his anxiety and depression and affect his mental health, "*not allowing [the Claimant] to recover fully*".

114. The conflicting situation is obviously the pending disciplinary matter. The email is written in the context of the Claimant recuperating from typhoid fever, having spent 10 days in the hospital. The Claimant is requesting NA to pay his February salary despite being absent from work without leave during the entire month. He does that by asking NA to take into account his financial difficulties that cause him further anxiety and depression, thus affecting his mental health and not allowing him to fully recover from typhoid fever.

115. Although the email has several references to "mental health", the Claimant does not say there that he suffers from a mental health illness, but rather that the situation he finds himself in (recuperating from a serious illness, having financial troubles, and facing a disciplinary hearing upon his return to work) affects his mental health. There are references to "my health condition" and

"poor health", but that refers to typhoid fever and not the Claimant's mental health conditions.

116. Therefore, read as a whole, the email does not disclose that the Claimant has underlying mental health problems or state how they affect the Claimant's ability to carry out normal day-to-day activities. On objective reading, the email says that the Claimant is not well enough to return to work because he is still recuperating from his physical illness (typhoid fever), and his GP advised him to avoid returning into a stressful environment pending his complete recovery.

117. The Claimant's previous reference to "mental health" was in the 29/09/20 email, almost 5 months earlier. As we found, he did not raise mental health issues with the Respondent either before or after that email. The 29/09/20 email was written in a completely different context (see paragraphs 109- 111 above). Therefore, there was nothing in that email which could reasonably be expected to cause the Respondent to link the two together, or to cause it to undertake further enquiries about the Claimant's mental health based on the content of the 21/03/21 email.

118. Furthermore, shortly after that, on 25 March 2021, the Claimant wrote another email with respect to the disciplinary allegations against him. In that email he says he is feeling much better and is confident of resuming work on Monday, 29 March 2021. He argues his case, demands further evidence and makes no reference to mental health issues.

119. It follows that we find that the Respondent did not know and could not have been reasonably expected to know that the Claimant had a disability before the meeting on 28 March 2021.

120. Therefore, the Claimant's complaints of failure to make reasonable adjustments and complaints of direct disability discrimination with respect to the alleged less favourable treatments in paragraphs 2.3.1, 2.3.2, 2.3.4, 2.3.5, 2.3.6, 2.3.7, 2.3.9, 2.3.10 and 2.3.11 on the List of Issues all fail on causation, because of lack of knowledge on the part of the Respondent.

121. We also find that the Respondent did not have knowledge of the substantial disadvantage, or at any rate did not have such knowledge before 28 March 2021.

122. At the meeting on 28 March 2021 the Claimant said that he was too busy and that's why the tasks he had been given were delayed. While at a stretch this might be interpreted as him saying that the first PCP ("*the requirement for him to work without an assistant from the start of his employment until January 2021"*) put him at a substantial disadvantage of not being able to complete his work on time, this was the first time that the matter was raised by the Claimant. We accept NA's evidence that the Claimant never asked him for an assistant in the past or suggested that he was not able to cope with the workload.

123. On balance, we prefer NA's evidence about the assistant issue. We find the Claimant's evidence on this point unreliable and implausible. There is nothing in writing from the Claimant asking for an assistant or complaining about Ramesh not being up to the job as his assistant. As we stated earlier, we find that the Claimant was not shying away from raising matters with NA in writing when he needed something from NA, such as time off or have his salary paid. Therefore, if the Claimant indeed was promised an assistant from the start or was told that Ramesh was his assistant, when the Claimant did not get an assistant and/or when he became dissatisfied with how Ramesh was assisting him, we would expect to see some correspondence from the Claimant to NA complaining about these matters. The Claimant makes no mention of that in any of his correspondence, including when challenging the disciplinary charges against him in his email of 25 March 2021. He does not even raise the issue of the promised assistant or that Ramesh was not giving him adequate assistance at the disciplinary hearing, which would have been a logical response to the Respondent's disciplinary charge of unsatisfactory standard of performance.

124. We also accept NA's evidence that it would have made no business sense for a small accountancy firm like the Respondent to hire a relatively junior accountant (the Claimant) and promise him an assistant, where other staff, including more senior staff all worked independently.

125. Furthermore, after the matter of being "too busy" was first raised by the Claimant at the disciplinary meeting, the Claimant never returned to work. Therefore, even if it could be said that following the Claimant's complaining about being "too busy", the Respondent has acquired knowledge of the substantial disadvantage, the Claimant could not have been put at any such disadvantage by reason of that PCP.

126. In any event, in our judgment, the adjustment the Claimant says should have been made - providing him with a fully trained assistant, would go beyond what reasonably could have been expected from the Respondent in the circumstances.

127. EHRC Employment code lists the following factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:

> "• *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
>
> • *the practicability of the step;*
>
> • *the financial and other costs of making the adjustment and the extent of any disruption caused;*
>
> • *the extent of the employer's financial or other resources;*

> *• the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
>
> *• the type and size of the employer.*"

128. We accept NA's evidence that the Respondent is a small employer, all its staff work independently, including senior accountants. The volume of work allocated to the Claimant was less than the workload of other employees. The Claimant was given training and support by his colleagues and by NA personally. That was also confirmed by Ms Vetrevell in her evidence.

129. Therefore, having an assistant hired just to help the Claimant with his work would have been, in our view, placing a too higher burden on the Respondent, as a small business with modest resources.

130. For the sake of completeness, we say that the second PCP (*the requirement for him to work with an assistant who was not fully trained after January 2021 until his resignation*) on a proper analysis is not a PCP, because the way it is pleaded it concerns the Claimant alone and not any other staff. Moreover, we find as a fact that there was no such requirement. We accept NA's evidence that Ramesh was not the Claimant's assistant, and the Claimant was not required to work with him.

131. The third PCP (*the requirement to only take 2-3 days study leave for his exams on 25/11/2020 – 08/12/2020*) falls on the Claimant's evidence. The Claimant accepted in his evidence that he had 2 weeks of study leave and was not required to only take 2-3 days of study leave.

132. Finally, for completeness, with respect to the remaining complaints of direct disability discrimination we find that the Claimant has failed to establish a *prima facie* case of direct disability discrimination. This conclusion applies to all 12 alleged less favourable treatments, including those that fall by reason of the Respondent's lack knowledge of the Claimant's disability before the disciplinary meeting.

133. Section 136 EqA states:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision*."

134. The guidance set out in ***Igen v Wong*** [2005] ICR 9311 (approved by the Supreme Court in ***Hewage v Grampian Health Board*** [2012] ICR 1054) sets out the correct approach to interpreting the burden of proof provisions. In particular:

a. it is for the employee to prove on the balance of probabilities facts from which the tribunal could conclude that the employer has committed an act of discrimination, in the absence of an adequate explanation (para 79(1), see also ***Ayodele v Citylink Ltd and anor*** [2018] ICR 748 at paras 87 - 106);

b. it is unusual to find direct evidence of discrimination and '[*i*]*n some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in*"' (at para 79(3));

c. therefore, the outcome of stage 1 of the burden of proof exercise will usually depend on '*what inferences it is proper to draw from the primary facts found by the tribunal*' (para 79(4));

d. in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts' (para 79(6));

e. where the employee has satisfied stage 1 it is for the employer to then prove that the treatment was "in no sense whatsoever" on the grounds of the protected characteristic and for the tribunal to '*assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question*' (para 79(11)-(12));

f. '[*s*]*ince the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof*' (para 79(13)).

135. In **Igen v Wong** the Court of Appeal cautioned tribunals '*against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground*' (at para 51).

136. In **Madarassy v Nomura International** PLC [2007] ICR 867 Mummery LJ stated that: '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination*' (at para 58).

**Submissions and Analysis**

137. The Claimant did not provide any direct evidence or evidence from which the Tribunal could reasonably draw inferences of discriminatory conduct with respect to any of the twelve matters he complains about. There is no evidence of anyone who is said to have been treated better by the Respondent. There

is no evidence to suggest that a hypothetical employee who did not have the Claimant's disability would have been treated better in similar circumstances.

138. In closings I pressed Mr Firman on this point. He did not have an answer. Put it simply, the Claimant's direct discrimination case does not get off the ground, even disregarding the Respondent's evidence. That is because there is simply no evidence of any kind of less favourable treatment, and that is despite the Claimant submitting three witness statements, none of which deal with the issues that he needed to deal with to meet his initial burden of proof. The Claimant has been professionally advised throughout the preparation of his case for the hearing. Therefore, we find no good reason for him not to present his claim for direct disability discrimination in cogent and consistent way by reference to the relevant legal test.

139. In his evidence the Claimant further undermined his direct discrimination claim by conceding that he understood what disciplinary complaints the Respondent had against him. Therefore, his alleged less favourable treatments 2.1.1 and 2.1.3 fall away on his own case.

140. It is revealing that in his oral evidence the Claimant sought to change his direct discrimination case suggesting that NA wanted to get rid of him because of his disability and orchestrated the disciplinary matter for that purpose. That is not how the case had been run until that point. This new allegation is not supported by any evidence the Claimant produced for the hearing. He said nothing of this nature in his witness statement. We reject this last-minute conspiracy theory.

141. It is also telling that in his closing submission Mr Firman sought to change the Claimant's direct discrimination case to suggest that it was the Claimant's sickness absence that caused the Respondent to initiate the disciplinary process. Again, that came out of the blue after all the evidence had been heard. It was a bare allegation not supported by any evidence. It was not part of the Claimant's pleaded case. There is no s.15 EqA claim in front of the Tribunal, and no application to amend was ever made at any stage of the proceedings.

142. In short, we find that the Claimant has failed to meet the initial burden of proof, and therefore his direct disability discrimination claim was doomed to fail even if we were to find for the Claimant on the issue of disability.

143. Even if we were to leave to one aside the burden of proof provisions, based on the evidence in front of us we are satisfied that we can make the positive finding that the reason for the alleged discriminatory treatments was in no sense whatsoever related to the Claimant's disability.

144. We accept NA's evidence on this point, which is supported by documentary evidence. Even Mr Firman chose not to challenge NA's evidence on this issue when cross-examining him. We find NA had genuine concerns about the Claimant's performance and conduct and that was the sole reason for which he initiated the disciplinary process.

145. Although some of the aspects of the process might not have been perfect, considering the size and administrative resources of the Respondent, the fact that it does not have a dedicated HR person, and that it was the first time NA conducted a disciplinary process, it is understandable that it might not have been fully in line with the ACAS Code of practice. In any event, we find that the Claimant's disability had nothing to do with any shortcomings in the process, or with any of the Respondent's actions in the run up to the disciplinary hearing, or the Respondent's conduct of the hearing, or the subsequent delay in communicating the outcome of the hearing.

146. We also find that the Respondent not paying the Claimant his salary for February 2021 was solely because the Claimant took unauthorised leave and had nothing to do with his disability. Other payment issues were the result of the parties working out the money due to the Claimant in light of the outstanding loan, various sick and unauthorised absences, and that was in no sense whatsoever related to the Claimant's disability (Issue 2.3.9).

147. The reason the Respondent sought to contact the Claimant when he was in the hospital was simply to obtain OTPs (see paragraph 32 above) and that had nothing to do with the Claimant's disability (Issue 2.3.10).

148. Finally, with respect to Issue 2.3.11, we find that as a fact that NA responded to the Claimant's enquiries in a timely manner and otherwise adequately communicated with the Claimant and any delay in responding to the Claimant was due to work pressure on NA and had nothing to do with the Claimant's disability.

149. We do not accept that NA was "aggressive" in the way he communicated with the Claimant. The only evidence presented by the Claimant was a WhatsApp message from NA to the Claimant of 2 February 2021 in which NA writes to the Claimant "*Where the hell are you*". NA was not cross-examined on that matter.

150. Whilst the language used by NA would not be generally appropriate in the business environment, the context of NA's using that language is important. NA did not approve the Claimant's request for leave and was expecting the Claimant to be in the office. On 2 February 2021, the Claimant did not come to work because he went to the Pakistani consulate to extend his passport. He did not inform NA about that in advance. When NA tried to call the Claimant. The Claimant ignored his calls. Given the Claimant's earlier conduct in taking leave without getting it approved by NA and his statement that he was going to Pakistan regardless of whether NA approved his leave or not, NA would have been understandably frustrated by the Claimant not showing up for work on 2 February. Therefore, in the circumstances we find that no adverse inferences could be properly drawn from the use of that language by NA, and the more likely explanation for that language was NA's frustration with the Claimant not showing up for work and ignoring NA's phone calls. This had nothing to do with the Claimant's disability.

151. It follows that for all of the above reasons the Claimant's claims for direct disability discrimination and for failure to make reasonable adjustments fail and are dismissed.

**Employment Judge P Klimov**
**Dated: 1 January 2023**

Annex

## LIST OF ISSUES

**Disability Discrimination**

**1. Disability**

1.1.Did the Claimant have a mental impairment namely acute anxiety and / or depression and / or obsessive-compulsive disorder or otherwise? Which impairment(s) does the Claimant seek to rely upon in this case?

1.2.Did the relevant impairment have a substantial adverse effect on his ability to carry out day-to- day activities?

1.3.If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.4.Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day without the treatment or measures?

1.5.Were the effects of the impairment long term? Did they last at least 12 months, or were they likely to last at least 12 months?

**2. Direct discrimination – section 13 EqA 2010**

2.1 Did the Respondent have knowledge of the Claimant's disability, or should the Respondent have known about the Claimant's disability?

2.2 If so, from what date did the Respondent gain knowledge?

2.3 Did the Respondent treat the Claimant less favorably than it treated or would treat others because of his alleged disability contrary to s13 Equality Act 2010? The alleged less favorable treatment relied upon by the Claimant is:

2.3.1 Not adequately explaining complaints to the Claimant in a disciplinary hearing on 28/03/21.

2.3.2 Not giving the Claimant advance notice of complaints in a disciplinary hearing on 28/03/21.

2.3.3 Not clearly defining complaints to the Claimant in a disciplinary hearing on 28/03/21.

2.3.4 Incorrectly asserting that the Claimant had not given any or any adequate notice of time off on 25/11/2020 – 08/12/2020 & 04/02/2021 – 24/02/2021.

2.3.5 Incorrectly asserting that the Claimant was failing to communicate with clients in a manner they could reasonably understand on 03/03/2021.

2.3.6 Incorrectly asserting that the Claimant was failing to carry out work in a satisfactory and timely manner on 03/03/2021.

2.3.7 Not giving the Claimant adequate notice of a disciplinary hearing on 5/03/2021.

2.3.8 Not communicating the outcome of a disciplinary meeting on 28/03/21 to the Claimant or giving the Claimant adequate notice of the outcome.

2.3.9 Failing to pay the Claimant's salary and/other payments due to him on time or at all.

2.3.10 Failing to take any or any proper account of his sickness and placing undue pressure upon the Claimant whilst off work and whilst at other times hospitalized.

2.3.11 Failing to communicate with the Claimant when requested and appropriate to do so whilst at other times talking to the Claimant in an appropriately aggressive manner.

2.3.12 Acting in a way towards the Claimant which left him no option but to resign on 3/05/2021.

**3. Failure to make reasonable adjustments – section 21 EqA 2010**

3.1 Did the Respondent apply a PCP to the Claimant which placed him at a substantial disadvantage in comparison with non-disabled persons contrary to section 20 (3) EqA 2010?

3.2 The alleged PCP relied upon by the Claimant is the requirement for him to work without an assistant from the start of his employment until January 2021, the requirement for him to work with an assistant who was not fully trained after January

2021 until his resignation and the requirement to only take 2-3 days study leave for his exams on 25/11/2020 – 08/12/2020.

3.3 If so, did the Respondent know that the Claimant was disabled and was likely to be placed at a substantial disadvantage by the PCP or, if not, should the Respondent ought to have known both that the Claimant was disabled and that the Claimant was likely to be placed at a substantial disadvantage by the PCP? If so, from what date?

3.4 If so, did the Respondent fail to take such steps as it was reasonable to take to avoid the disadvantage contrary to section 21 EqA 2010?

3.5 The steps the Claimant alleges ought to have been taken are for the Claimant to be provided with an assistant from the start of his employment until January 2021, for the Claimant to be provided with a fully trained assistant from January 2021 until his resignation and for the Claimant to be allowed 2 weeks study leave for his exams on 25/11/2020 – 08/12/2020.

3.6 Was it reasonable for the Respondent to not agree an adjustment / the adjustment referred to at

3.5 above taking all the circumstances into consideration?

**4. Unlawful Deductions from Wages / Breach of Contract**

4.1 Did the Respondent fail to pay the Claimant his salary for the month of February 2021?

4.2 Did the Respondent fail to pay the Claimant his accrued holiday pay upon his resignation?

4.3 Did the Respondent fail to make a payment to the Claimant for his notice pay, on the basis that he did not resign with immediate effect? Did the Claimant resign with immediate effect?

4.4 Did the Respondent fail to pay the Claimant statutory sick pay for the period 1st March to 25th April 2021?